

417227-II
No. 47122-7-II

Jefferson County Cause No. 07-3-00172-0

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

BRUCE BLATCHLEY

Appellant

v.

SANDRA PETRANEK

Respondent

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DIVISION II
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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Court erred in vacating the original decree entered April 11, 2008.
2. The Court erred in making Conclusion of Law 3.4.
3. The Court erred in making the property division set forth in the judgment entered in cause number 07-3-00172-0.
4. The Court erred in making Finding of Fact 2.5.
5. The Court erred in making Finding of Fact 2.7.
6. The Court erred in making Finding of Fact 2.8.
7. The Court erred in making Finding of Fact 2.9.
8. The Court erred in admitting Exhibit 12, over objection of Blatchley.
9. The Court erred in finding Blatchley earns over \$50,000 annually.
10. The Court erred in enforcing the judgment on the day it was entered, in violation of CR 62.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court err in vacating a decree of dissolution under CR 60(b)(4) & (11) because it purportedly failed to dispose of the property in the decree, when the grounds for coercion were not met, and the decree did in fact specify how to distribute the property? Error 1.
2. Did the Trial Court fail to make an fair and equitable distribution of property when the wife received a significantly disproportionate percentage of the community property and the husband received no separate property, which left the parties in greatly varied economic circumstances? Error 2 & 3.
3. Did the Trial Court err by failing to consider an original decree as the basis for the division of the community property, when the original decree was a knowing voluntary and intelligent reflection of the agreement of the parties at the time? Error 2 & 3
4. Did the Trial Court err in making Finding of Fact 3.4, when it was not supported by clear cogent and convincing evidence? Error 2
5. Did the Trial Court err in assigning a separation date that was not supported by clear cogent and convincing evidence? Error 4
6. Did the Trial Court err in failing to treat the original decree as a separation agreement when it met all the requirements of a written

agreement regarding the separation of property made in contemplation of divorce? Error 5

7. Did the trial Court err in assigning a value to the Wells Fargo bank account that varied from the evidence? Error 6

8. Did the Trial Court err in admitting a document that is irrelevant? Error 8

9. Did the Trial Court err in finding Blatchley had an annual salary that was not supported by the evidence? Error 9

10. Did the Trial Court err in violating CR 62 by enforcing the judgment on the day it was entered? Error 10

C. STATEMENT OF THE CASE

Bruce Blatchley and Sandra Petranek were married in 1997. (RP 44) The couple purchased several parcels of real property during the marriage, made improvements, sold the parcels for a profit and rolled the profit into buying another property. (Ex. 54) They bought the first parcel of property in June 1998, with Blatchley's separate funds he received from a personal injury settlement. (RP 285) They purchased the fifth and last property in August, 2007, just after adopting a daughter and just before filing a petition for dissolution in December, 2007. (RP 111, 123, 126)

During the marriage Petranek claims she received an inheritance of \$538,000. (RP 34) This amount was disputed, and opposing counsel conceded there was insufficient evidence to trace the money as the source of the funds used to purchase and improve the properties, but the Trial Court nonetheless relied on this number in granting Petranek a 75% share of the community property. (RP 369; CP 52)

Blatchley worked for most of the marriage, but Petranek failed to engage in any real employment, living off of her inheritance. (RP 172, 286, 289, 298-300) The parties adopted a girl in July 2007, although they had already begun discussing separation. (RP 123, 306-09) At this time the parties were living at the “Greenway” property, which they soon sold. (RP 124) They had an oral agreement to split the proceeds between them 50/50, in contemplation of separation. (RP 310)

They considered buying separate properties at this point, but instead decided to jointly fund another property, known as the “South Edwards” parcel, so they could both be close to their newly adopted daughter. (RP 311) They agreed to fund South Edwards as follows: Petranek contributing \$200,000.00 from her share of the proceeds from Greenway, and Blatchley contributing \$115,000.00 from his share of the Greenway proceeds. (RP 311; Ex. 54) Blatchley then planned to live

alone on the back 1/3 of the property, so he could remain close to his daughter. (RP 313)

The closing on the sale of the Greenway property was done simultaneously with the closing for the purchase of the South Edwards property. South Edwards was less expensive than the total proceeds from Greenway, and Petranek and Blatchely deposited the excess cash (\$134,939.94) on August 7, 2007, in their joint Wells Fargo account. (RP 124-27) The next day, acting in accordance with the agreement, Blatchely made two withdrawals from the joint checking account equaling \$109,000 and opened a separate account. (RP 312) Petranek did not object. (RP 313) This amount equaled his share of the Greenway proceeds less his \$115,000 contribution to the purchase of South Edwards. (RP 312-13) Several months later, in November 2007, he purchased a vacant lot in Hawaii for approximately \$40,000.00 from his share. (RP 312-14) Petranek was informed of the purchase and made no objection. (RP 312-14)

In late 2007, Petranek prepared and filed a petition for dissolution, which Blatchley joined. (RP 315) In that document, Petranek stated that she and Blatchely “have equitably divided mutual property.” (CP 1, p.3 par.1.8) The parties proceeded pro se with their dissolution, amicably dividing up their personal property. On April 11, 2008, they entered an

agreed order splitting their last remaining jointly owned property between them, 2/3 to Petranek and 1/3 to Blatchley. (CP 10-11) This split was based upon the unequal contributions each party made to the purchase price of South Edwards from their equal shares in the previously sold Greenway parcel. (RP 317) The Order of Decree of Dissolution was reviewed and signed by Judge Verser on April 11, 2008. (CP 11)

The record also consisted of the Findings of Facts and Conclusions of Law, dated April 11, 2008. (CP 10) In that form document, Petranek checked the box stating there was “No written separation contract or prenuptial agreement” but then also checked “The separation contract or prenuptial agreement should be approved.” (CP 10, page 3¹) The form also characterized the South Edwards property as community property, and indicated that neither party had any separate real or personal property. (CP 10, page 3) Finally, the document states that “The distribution of the property and liabilities as set forth in the decree is fair and equitable.” Petranek voluntarily signed the Findings of Facts and Conclusions of Law on March 20, 2008, and the Court approved it on April 11, 2008. (CP 10)

The record also contained the Decree of Dissolution entered on April 11, 2008. (CP 11) On the front page is stamped the word

¹ The trial court used this as an example of the inadequacy of the April 11, 2008 decree. (CP 52) However, there is another logical explanation, supported by the testimony and record. The parties had orally agreed how to split their property and were awaiting court approval to “approve” their agreement.

“Reviewed” (CP 11) Under paragraph 3.2 Petranek voluntarily wrote down these words “Husband will retain 1/3 equity in the property located at 357 South Edwards Road, P.T. WA 98368” (CP 11) Under paragraph 3.3 Petranek voluntarily wrote down “Wife will retain 2/3 equity in the property located at 357 South Edwards Road, P.T. WA 98368 (CP 11, page 3) Petranek never listed any separate property on the Decree (CP 11, page 3) Petranek voluntarily signed the Decree of Dissolution on March 20, 2008 and the Court approved it on April 11, 2008. (CP 11)

Seventeen months later, Petranek engaged attorney Peggy Ann Bierbaum, who moved to vacate the decree under CR 60 (b)(4) and (11), alleging fraud, misrepresentation, or other misconduct by Blatchley. (CP 16) Blatchley strenuously objected, contending that Petranek had not met the elements of fraud under CR 60(b)(4), thus the Court should not vacate the decree but must treat the parties as tenants in common. (CP 52) Judge Verser adopted Ms. Bierbaum’s argument wholesale, vacated the decree and the parties started back at square one. (RP 15)

The case then went to trial, and Judge Verser entered a memorandum opinion and order on December 7, 2010. (CP 52) Judge Verser determined that community was worth \$447,420 awarded 75% of the community assets to Petranek, and 25% to Blatchely. (CP 52) Judge Verser then awarded an additional \$25,051 to Petranek as her separate

property. (CP 52) Blatchley appeals the vacation of the April 11, 2008 decree and the subsequent distribution of assets between the parties contending both legal and factual errors.

D. ARGUMENT

I. The Court abused its discretion in vacating a decree of dissolution under CR 60(b) (4) and (11) when the grounds for coercion were not met and the decree specified the distribution of the property.

a. The issue is reviewed under an abuse of discretion standard.

Courts review a trial court's ruling on a motion to vacate a decree of dissolution under CR 60(b) for abuse of discretion. *Little v. King*, 160 Wash.2d 696, 702, 161 P.3d 345 (2007). A Trial Court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. *In re Marriage of Tang*, 57 Wash. App. 648, 789 P.2d 118 (1990).

Under Washington law, a dissolution decree that disposes of property should not be revoked or modified “unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.” RCW 26.09.170. The decree in the present case was vacated for untenable reasons and the motion to vacate should be reversed.

b. The trial court abused its discretion because there was no evidence of misconduct by Blatchley

Petranek contended Blatchley threatened to withhold the adoption of their child unless she agreed to distribution of property as set forth in the April 11, 2008 decree. (RP 231) This contention was contradicted by the testimony and the record.

Blatchley presented conclusive proof in his response to the CR 60(b) motion that the final adoption was completed July 27, 2007, after their daughter had lived with them for 9 months. (CP 17-18) The adoption was complete *before* the parties equally split the proceeds of the Greenway property and jointly funded the purchase of the South Edwards Property (CP 17) The record is clear that it was 8 months after their daughter's adoption, April 2008, that they voluntarily agreed to split South Edwards 1/3-2/3 based roughly on the contributions to the purchase price (Ex 54) The record is clear that the parties agreed on child support and a parenting plan. (CP 55) It was impossible for the trial court to have found any evidence of coercion by Blatchley that caused Petranek to agree to the distribution of assets that as she did in the original dissolution proceedings.

The record does not support a finding of coercion pursuant to CR 60(b)(4). The only remaining possibility was to vacate under CR 60(b)(11).

c. The Trial Court abused its discretion because the original decree specified the distribution of the property

Petranek argued that the original decree should be vacated under CR 60 (b)(11) because it allegedly failed to comply with RCW 26.09.050. (CP 16) RCW 26.09.050 requires a court entering a decree of dissolution to “make provision for the disposition of property and liabilities of the parties.” The statute does not state the court must make provision for *all* property and liabilities, nor should a word be read in that could easily have been added by the legislature, had that been its intent. *See Marriage of Furrow*, 115 Wn.App. 661, 671, 63 P.3d 821 (2003) “Where the language of a statute is clear and unambiguous, its meaning must be derived from the statutory language itself.”

Moreover, Washington courts typically do not vacate a decree for the failure to include all properties owned by the parties unless there is evidence of deception or ignorance. *Marriage of Tang*, 57 Wn.App. 648, 651, 789 P.2d 118 (1990). Clearly, both Petranek and Blatchely knew

exactly what was owned by the other when they entered into the original decree.

Nonetheless, Petranek argued the decree violated CR 60(b)(11), which allows a court to vacate an order for [a]ny other reason justifying relief from operation of the judgment.” The use of this rule is extremely limited and should be reserved for “extraordinary circumstances” in which irregularities exist outside of the action of the court. *Marriage of Furrow, Id.* at 828. Divorcing parents attempting to work out their break up in an economical and amicable manner is neither extraordinary nor irregular.

The decree was an **agreed** *pro se* dissolution that was voluntarily entered into by Petranek. At most all that exists is a mutual mistake by the parties for not being as detailed as normal. The Court is only required to dispose of the property that is brought to its attention by the parties. *Shaffer v. Shaffer*, 43 Wash. 2d 629, 630, 262 P.2d 763, 764 (1953). Per Blatchley’s declaration, only the South Edwards property remained to be divided between them (CP 17, page 4 ln. 6-15)

The Petition for Dissolution filed on December 31, 2007 clearly stated the parties had mutually separated their property and the findings entered in conjunction with the decree specifically listed the last remaining major asset of the parties, “357 South Edwards Street, P.T., WA, 98368.” (CP 1) The parties also clearly stated that there was no further separate

real or personal property to be divided. (CP1) The record is clear that both Blatchley and Petranek had taken substantial steps to separate their interest and property in contemplation of divorce.² (CP 20; CP 17)

The decree unambiguously granted a 1/3 interest in South Edwards to the husband and a 2/3 interest to the wife, leaving the parties as tenants in common. The findings and decree on its face made provisions for disposing of the real property that was before the Court, but even if this Court finds it was not entirely clear, the long standing rule in this state has been to treat the parties as tenants in common as to real property not disposed of in the dissolution decree. *Fritch v. Fritch*, 53 Wash. 2d 496, 502, 335 P.2d 43, 47 (1959) *Witzel v. Tena*, 48 Wash. 2d 628, 632, 295 P.2d 1115, 1117 (1956); *See also Ghebremichale v. Dep't of Labor & Indus.*, 92 Wash. App. 567, 574, 962 P.2d 829, 833 (1998) (Failure of the court to comply with the requirements of RCW 26.09.050 does not make a judgment void under CR 60).

The failure to settle ancillary matters at the time the trial court enters a final decree of separation or dissolution is a procedural error, not a

² The record before the trial court is clear. In Respondents first declaration in support of the motion to vacate, she states "Later in November 2007, Bruce purchase property in Hawaii, intending at the time to move there when our divorce was finalized." (CP 16, pg. 2, ln 8). Then, in her June 23, 2008 letter, Petranek discusses the South Edwards property as her property, not their property together. "He helped me build **my** barn... I realized I did NOT want him living with P. and I any longer- **he was not paying rent**... I asked him to **move out**...he **moved into a trailer** he bought... We finalized our divorce in April..He moved out in April after he started dating a women [sic] in Olympia" [emphasis added] (CP 16)

jurisdictional defect. See *Little v. Little*, 96 Wash. 2d 183, 192-93, 634 P.2d 498, 504 (1981). Errors of law may not be corrected by a motion under CR 60(b), but must be raised on appeal. *Id*; *Marriage of Tang*, 57 Wn.App at 654; *Haley v. Highland*, 142 Wash.2d 135, 156, 12 P.3d 119 (2000).

Petranek did not timely appeal the entry of the decree on April 11, 2008. If she feels she made a mistake, she did not appeal the decree under CR 60(b)(1) within the one year time limit. If she feels the decree was not “fair”, fairness after the fact has been rejected by the Supreme Court as a basis to vacate decrees. *In re Marriage of Moody*, 137 Wash. 2d 979, 991, 976 P.2d 1240, 1246 (1999).

The Court abused its discretion in granting the motion to vacate under these facts.

d. Petranek’s claimed ambiguity was not grounds to vacate

Since disposition of property is final in a dissolution action per RCW 26.09.170, Petranek had to alleged either fraud, coercion, or such extraordinary ambiguity that she was entitled to extraordinary relief under CR 60(b)(11). It was clear error by the Trial Court to adopt the ambiguity argument as it is neither supported by the facts presented to the trial court, nor warranted by existing law.

A party who voluntarily chooses not to value an asset before settlement “should not be allowed to return to court to do what should have been done prior to entry of the final decree *In re Marriage of Curtis*, 106 Wash. App. 191, 197, 23 P.3d 13, 16 (2001). Even if the Court attempts to assign blame to its self for not fully reading the decree, it has been held there are no grounds to modify a judgment because the court inadvertently omitted a provision which it had intended to make.

McCaffrey v. Snapp, 95 Wash. 202, 163 P. 406 (1917).

As noted above, errors in law in dissolutions decrees are not subject to CR 60 motions. Where the language of a dissolution decree is properly subject to interpretation, the construction of the decree is a question of law. *Byrne v. Ackerlund*, 108 Wash. 2d 445, 455, 739 P.2d 1138, 1143 (1987). If a decree is not ambiguous, there is nothing for the Court to interpret. See *In re Marriage of Mudgett*, 41 Wash. App. 337, 341, 704 P.2d 169, 173 (1985). (A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties)

If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. See *In re Marriage of*

Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981); *Kruger v. Kruger*, 37 Wn.App. 329, 331, 679 P.2d 961 (1984). Ambiguities may be resolved by reference to the parties' property settlement agreement. See 20 Wash. Prac., Fam. And Community Prop. L. § 32.41

An ambiguous decree may be clarified, **but not modified**. RCW 26.09.170(1); *In re Marriage of Greenlee*, 65 Wash.App. 703, 710, 829 P.2d 1120, review denied, 120 Wash.2d 1002, 838 P.2d 1143 (1992). A decree is modified when rights given to one party are extended beyond the scope originally intended, **or reduced**. *In re Marriage of Thompson*, 97 Wash. App. 873, 878, 988 P.2d 499, 502 (1999) A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969).

The Court abused its discretion by completely vacating the April 11, 2008 decree, resulting in the cancellation of the parties' agreement concerning the division of the equity in the South Edwards property. Rather, the trial court should have clarified the decree, leaving intact the parties agreement.³ Petranek should have been estopped from

³ The Hawaiian property, bank accounts or other personal property were not mentioned because the parties had already divided up their belongings. CP 17, p.4 line 1-16.

complaining the alleged ambiguity in the decree necessitated vacation, when she is the party that drafted it and the parties relied upon it for 17 months. *Byrne* at 455. *See also, National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-913, 506 P.2d 20 (1973) (One who voluntarily signs a document will not be heard to say he was ignorant or misled concerning its contents, absent fraud, coercion or deceit.)

Petranek failed to meet the appropriate burden under CR 60 and the Court erred by granting her request to vacate the decree.

II. The Trial Court failed to make an fair and equitable distribution of property when the wife received a significantly disproportionate percentage of the community property and the husband received no separate property, which left the parties in greatly varied economic circumstances.

a. A trial court will be reversed if its award results in a patent disparity. A trial court's property division in a dissolution proceeding will be reversed for a manifest abuse of discretion. *Urbana v. Urbana*, 147 Wn.App. 1, 5, 195 P.3d 959 (2008). An abuse of discretion occurs when a ruling is manifestly unreasonable, or based on untenable grounds or untenable reasons. *Id.* An award that results in a "patent disparity in the parties' economic circumstances" is an abuse of discretion. *Id.* The Trial

Court's award in the present case was manifestly unreasonable, based on an untenable interpretation of the evidence, and resulted in a patent disparity in the economic circumstances of the parties. It must be reversed.

b. The trial court's order was significantly disproportionate

A trial court's primary goal is to ensure a fair and equitable distribution, even if it mischaracterizes the property. *In re Marriage of Smith*, 158 Wash. App. 248, 259, 241 P.3d 449, 454 (2010). But in this case, the Trial Court's award was unfair because it awarded a substantial portion of the community property based upon a faulty premise.

A division of property does not need to be equal and does not require mathematical precision in order to be fair and equitable. *Urbana v. Urbana*, 147 Wn.App. 1, 6, 195 P.3d 959 (2008). However, of paramount concern is the economic circumstance in which each spouse is left. In *Marriage of Davison*, 112 Wn.App. 251, 48 P.3d (2002), the court upheld a 75/25 division of community property that favored the wife because a disproportionate award of separate property favored the husband. *Id.* at 258.

The Trial Court determined the community was worth \$447,420 and granted 75% of the community assets to Petranek, and 25% to

Blatchley. (CP 52) The trial court then awarded an additional \$25,051 to Petranek as her separate property. (52) The Court based its decision on its belief that Petranek spent all her inheritance on the marriage, while Blatchley contributed almost nothing. (CP 52, p.5) Moreover, the Court found Blatchley earned over \$50,000 annually, when the testimony was merely that he presently was working for \$25 per hour. (CP 52, p.4; RP 338-39)

The Trial Court's analysis is contradicted by the testimony and evidence presented and is supported only by argument of Ms. Biernbaum, who conceded the evidence tracing the inheritance to any specific purchase or improvement was insufficient. (RP 369)

A disproportionate award of 75% of assets is a violation of settled case law. For instance, the Washington Supreme Court stated that a 1/3-2/3 split is unreasonable when no fault is assigned to the party receiving the lesser amount. *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957); *see also Dickson v. Dickson*, 64 Wn.2d 585, 399 P.2d 5 (1965).

c. There was no factual basis for the claim that Petranek's inheritance primarily funded the marriage, nor for the amount of her inheritance.

Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Id.*

In its Memorandum Opinion, the Court found Petranek had inherited \$538,000. (CP 52, p.2, line 12) The evidence in this case clearly contradicts the Trial Court's finding.

1. \$200,000 of "separate property" is unsubstantiated.

The \$538,000 inheritance could not be proven except for self serving testimony; approximately \$200,000 is unsubstantiated. Petranek introduced her testimony and her sister Pam Jander's testimony that they both received approximately \$538,000. (RP 28) This is biased testimony that was not supported by the evidence. Exhibit 12, the probate documents, are vague and Blatchely objected to them because they do not show the additional expenses that were paid out of Petraneks' father's

estate, nor the amounts distributed to the heirs. (RP 60-62) It was an error to admit this document for the purpose of establishing the inheritance as \$538,000.

Exhibit 21 shows the account value for Petranek's sister, Jander. This account shows approximately \$344,540.67, roughly equivalent to the \$338,873.03 received by Petranek, Exhibit 16. Both account documents are the only evidence presented of what the heirs received from Petranek's father's estate. Petranek could not account for \$200,000, admitting she had no record of receiving \$538,000. (RP 187-88) Despite her testimony, Judge Verser adopted Ms. Bierbaum's argument that Petranek brought in \$538,000 to the marriage, and used this faulty number as a basis to award her 75% of the community. This was an abuse of discretion.

2. Petranek lost a large portion of her inheritance in the market.

The Court failed to consider the amount of Petranek's inheritance lost by a downturn in the market and her frequent day trading. (RP 271, 274) For example, in one 14 month period, she lost over \$32,000 due to market volatility. (RP 193, 271, 274; Ex. 16) Petranek had an unrealized loss in August of 2006 of over \$24,000, due to holding onto her portfolio rather than cashing it in. (RP 277, Ex 37). Almost every month, Petranek was losing money in the market, money that could not be funding the

purchases of the real properties and the parties' lifestyle. (Ex. 37) The Court erred by failing to take this into account.

d. The Trial Court erred by not properly calculating Blatchley's contributions to the community.

Petranek argued that Blatchley contributed very little to the marriage and that it must have been all of Petranek's inheritance that funded their living and allowed them to purchase the properties. (RP 278) The evidence showed, however, that several of the properties were funded by community loans and she has no record of her inheritance paying off those loans. (Exs. 11, 17, 23, 27, 28, 30, 31, 33) The testimony and the exhibits makes it clear Petranek's position that Blatchely did not contribute significantly to the community is not true.

Blatchley earned the only reportable community wage in the marriage, with records showing earnings of \$145,928 over the years. (RP 73-79) Even when there was very little or no reported income, he was still working either under the table or directly improving the properties with such endeavors as building a barn, replacing a roof, remodeling a kitchen, or gutting and rebuilding interior spaces. (RP 290, 293-95, 330) Petranek, on the other hand, did not contribute to the community except through her

inheritance and some minor occasional house cleaning and gardening jobs.

(RP 295-300)

The Court based its division of community property on faulty grounds: it failed to give Blatchley credit for his contributions to the community and focused solely on an inflated and speculative accounting of Petranek's inheritance. (CP 52, p.5) This was an abuse of discretion

e. Blatchley's position is supported by case law

1. Marriage of Nuss does not apply or was mis-applied.

The Trial Court relied upon the *Nuss* case in crediting Petranek with providing the funds for purchasing various properties. (CP 52, p.5) *Nuss* allows a court to consider the separate source of community property when dividing community assets. *Nuss v. Nuss*, 65 Wash. App. 334, 340, 828 P.2d 627, 631 (1992). Unlike *Nuss*, Petranek utterly failed to prove with the amount of her inheritance, nor can the funds used to purchase the South Edwards property be traced to the inheritance. Petranek admitted tracing was impossible. (RP 369) It was an error of fact to find the origin of the community property was Petranek's inheritance and it was an error of law to justify awarding 75% to Petranek based upon *Nuss*.

2. *Blatchley's separate personal injury settlement money contributed to the community.*

The first property purchased by the parties was the “Blossom Lane” parcel, bought for \$33,000 in 1998. (Ex. 9) Petranek agreed that Blatchley used funds he received from a personal injury settlement (\$56,000.00) to purchase the real property. (RP 178) The parties made improvements to Blossom Lane, relying on Blatchley’s labor and skills. (RP 290) The parties took out a \$20,000 community mortgage to fund the improvements. (RP 289) Blatchley’s settlement money funded additional improvements. (RP 180) After Petranek received her inheritance, she help fund some of those improvements, but she could not account for the amounts. (RP 186) The property increased in value and the parties sold it in 2003 for \$138,995. (Ex.18; RP 69)

Blatchley requested the Court to consider the contribution he made to Blossom Lane, which was funded by his personal injury settlement, to be a contribution from his separate property. It was this first profitable real estate venture that put the parties on the path to their ownership of South Edwards. The Court instead treated the personal injury settlement as community property, under *Brown v. Brown*, 100 Wash. 2d 729, 675 P.2d 1207, 1208 (1984). This was a misapplication of the ruling in *Brown*.

The court in *Brown* considered the character of funds received from a personal injury settlement. It states that the recovery for an injury inflicted upon a married person by a third-party tortfeasor is the separate property of the injured spouse, except to the extent the recovery compensates the community for lost wages which would have been community property, or injury-related expenses which the community incurred. *Id.* at 730. The only testimony before the Trial Court was the lost wages of 4-5 months. (RP 177, 286) The rest should be presumed to be separate property which funded the Blossom Lane purchase.

f. The 75/25 split was unreasonable

Blatchley requested the Court award him his 1/3 share of the South Edwards property and the Hawaii parcel, because that was the parties agreement when they signed the April 11, 2008 decree. This resulted in him receiving approximately 41% of the value of the real properties. This was a fair and equitable resolution.

The Trial Court's award of 75% of the total community property to Petranek was based on findings not supported by the evidence or the law. It resulted in the disparate economic status of the parties and was an abuse of discretion. The basis for which the trial court determined Petranek

should be awarded 75% of the community is not supported by the evidence or by the law. The division of property must be overturned.

III. The Trial Court erred by failing to treat the original decree as a pro se settlement agreement or as evidence of a binding agreement.

a. Contract law applies to settlement agreements

Washington courts apply rules of construction applicable to contracts to determine the intent of the dissolution decree. *Stokes v. Polley*, 145 Wash. 2d 341, 346, 37 P.3d 1211, 1213 (2001). Decrees should be construed as a whole, giving meaning and effect to each word. *Id.* The words used have the legal effect as understood by the law at the time the decree was entered, with words given their ordinary meaning. *Id.* at 347. Where a property settlement agreement is approved by a divorce decree, the rights of the parties rest upon the decree rather than the property settlement. *Mickens v. Mickens*, 62 Wash. 2d 876, 881, 385 P.2d 14, 17 (1963). Therefore, the decree is the basis to determine the final agreement of the parties, not Petranek's subjective testimony after the fact that she no longer agreed to split the proceeds 50/50.

While the original decree was not labeled as a formal separation agreement, that doesn't mean there wasn't an enforceable agreement under RCW 26.09.070. First, the requirement of writing is permissive under the

plain language of the statute: the parties “may enter into a written separation contract providing for ..., the disposition of any property owned by both or either of them.” RCW 26.09.070. However, regardless, it is clear that Petranek reduced their agreement to writing when she prepared the April 11, 2008 findings of fact and conclusions of law, and the dissolution decree. In the pleadings the parties checked the box “The separation contract or prenuptial agreement should be approved.” (CP 10, p. 3) Clearly, the parties had agreed on how to dispose of their property and wanted the Court to approve it, which it did.

In *Dewberry*, the court found that complete performance of an oral prenuptial agreement during the marriage established its existence.

DewBerry v. George, 115 Wash. App. 351, 363, 62 P.3d 525, (2003).

Courts will honor a challenged property agreement between husband and wife if the party asserting the protection of the agreement can demonstrate by clear and convincing evidence (a) the existence of the agreement, and (b) both spouses have abided by the agreement. *In re Diafos*, 110 Wash. App. 758, 767, 37 P.3d 304, 309 (2001).

Here the evidence shows that Blatchley performed in accordance with the agreement made in August 2007 to split the proceeds 50/50. Petranek acknowledged it by memorializing it in the April 11, 2008 dissolution decree, nine months later. The parties then abided by the

agreement for 17 months until Petranek came into Court and claimed she was “coerced” into making it.

b. Petranek and Blatchely had a binding agreement

After the Trial Court vacated the original decree, over objection, Blatchley requested the Court to view the original decree as evidence of the parties agreement at the time they knowingly, intelligently and voluntarily signed the documents. (CP 43) The agreement was to split the Greenway money equally, then fund the South Edwards property in 1/3-2/3 manner. (CP 43; RP 347) The Court declined to do so, instead finding there was no “separate property”, only community funds, because Blatchley failed to establish the existence of an agreement to split up the proceeds. (CP 52, p.6)

Blatchley contends this is an error, because the record established the agreement by clear cogent and convincing evidence. The evidence is:

* In Spring 2008, the parties went to the courthouse to prepare legal document to dissolve their marriage. One of the documents **prepared by Petranek** was the original decree that was approved on April 11, 2008, then vacated some seventeen months later. (CP 1) This document references the agreement to fund the South Edwards property with a 1/3-2/3 contribution. (CP 1; RP 259) She testified she was not coerced into

writing this. (RP 262) The argument that she signed this document only because Blatchley threatened to derail the adoption proceedings is not believable as the adoption had been finalized nine months earlier.

* **Petranek prepared** Exhibit 54 in contemplation of litigation to explain the history of the properties. This is written documentation memorializing the agreement, (Ex. 54)

Concerning Greenway -“Net Proceeds Total \$449, 402.00 (Bruce and Sandra split the Net Proceeds 50%)”

Concerning S. Edwards- “Source of Funds \$200,000 from Sandra’s net proceeds from the sale of 334 Green Way, PT and \$115,000 from Bruce’s net proceeds from the sale of 334 Green Way, PT for D.P.”

* Blatchley testified there was an agreement to split Greenway proceeds equally and fund South Edwards with a 1/3/-2/3 division. (RP 312)

* Blatchely’s subsequent action in reliance in the agreement. The day after the Greenway proceeds were deposited, Blatchely removed his portion minus this one third contribution to the South Edwards property. (RP 32; Ex. 35) Petranek knew of and did not object to this withdrawal in accordance with their agreement. (RP 236, 242-43)

* Blatchley purchased a parcel of property in Hawaii with his portion of the Greenway proceeds, and Petranek knew of its existence. (RP 256-257) The Hawaii parcel was not included in the original decree because the parties had already split their assets. (RP 255)

* Petranek testified to “many discussions” regarding the agreement. She admitted they discussed the 50/50 split, but waffled as to whether they had an agreement. (RP 244) Her testimony was soundly impeached by counsel using her deposition, in which she clearly admitted to the agreement. (RP 248, 258-59, 268) Moreover, on re-direct, Petranek did not deny the agreement, merely stating she no longer agreed with it. (RP 280-81)

Given the overwhelmingly abundant evidence, the Trial Court erred in finding the agreement to split the property did not exist. Alternatively, the Court found the agreement was unfair. This, too, was error.

IV. The Trial Court erred in finding that the agreement was not fair

a. Courts encourage amicable agreements. Amicable agreements are preferred to adversarial resolution of property and maintenance questions, and a separation contract is binding upon the court unless it finds that the contract was unfair at the time of its execution. RCW 26.09.070(3). *Little v. Little*, 96 Wash. 2d 183, 192-93, 634 P.2d 498, 504 (1981). Agreements made between spouses concerning property are enforceable if they are entered into with full disclosure concerning the amount, character and value of property involved, and if the agreement

was entered into fully and voluntarily on independent advice and with spouse's full knowledge of her rights. *In re Marriage of Hadley*, 88 Wash. 2d 649, 565 P.2d 790 (1977) *In re Marriage of Cohn*, 18 Wash. App. 502, P.2d 79 (1977). *Shaffer v. Shaffer*, 47 Wash. App. 189, 733 P.2d 1013, (1987)

The trial court determined that even if the agreement to split the Greenway proceeds 50/50 did exist here, it was “unfair” because there was no evidence that Petranek made the agreement “fully and voluntarily” and she did not have independent advice from an attorney with full knowledge of her rights. (CP 52 , p.7)

The evidence clearly contradicts these findings and the Court applied the wrong standard concerning counsel.

b. Petranek knew the value of the property when she made the agreement.

The Trial Court found Petranek knew the amount, character and value of the property involved. (CP 52, p.7)

c. Petranek testified she “fully and voluntarily” made the agreement. The Trial Court found “no evidence” that Petranek “fully and voluntarily” made the agreement. (CP 52, p.7) This is contradicted by the testimony and evidence at trial.

Going into trial, Petranek maintained the theme that she was “coerced” into the agreement to split the proceeds. Blatchley proved that was impossible, as the adoption homestudy was completed on July 11, 2007 and the adoption finalized on July 27, 2011, before the parties acted on the agreement to split the proceeds when the sale of Greenway closed on August 6, 2007 and the entry of the final decree on April 11, 2008. (CP 17) She was asked directly if she voluntarily prepared Exhibit 54, which references the split, without being coerced. She answered yes. (RP 243-244) In fact the testimony by both parties is that Blatchley continues to maintain a close relationship with their adoptive daughter. (RP 231-32, 310) There were, in Petranek’s words, NO “relevant” promises made by Blatchley to split South Edwards as they did. (RP 267) She denied Blatchley threatened her to force her make the division as she did. (RP 262) She testified she prepared the dissolution decree of April 11, 2008, voluntarily agreed to is, and it was an act of free will. (RP 259, 268)

Petranek offered no evidence of coercion. Criminal coercion is defined as: [coercion] if by use of a threat he compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he has a legal right to engage in. RCW 9A.36.070. Threats are defined in RCW 9A.04.110(25)(a), (b), or (c).

Civil coercion, “duress” is similarly defined, from the standpoint

that circumstances must demonstrate that a person was deprived of his free will at the time he or she entered into the agreement. 25 Wash. Prac., *Contract Law And Practice* § 9:14. A party to a contract which he has voluntarily signed cannot, in the absence of fraud, deceit, or coercion be heard to repudiate his own signature. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wash. 2d 939, 944, 640 P.2d 1051, 1054 (1982).

Petranek offered no evidence of fraud or negligent misrepresentation. To prevail on a claim of negligent misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence that he or she justifiably relied on the information that the defendant negligently supplied. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d 536, 545, 55 P.3d 619, 623 (2002) *Angelo v. Angelo*, 142 Wash. App. 622, 643, 175 P.3d 1096, 1106 (2008), as amended (Jan. 29, 2008), review denied, 164 Wash. 2d 1017, 195 P.3d 89 (2008). Fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. *Peoples State Bank*, 55 Wash.App. at 372, 777 P.2d 1056.

Petranek simply offered no evidence of coercion or misrepresentation at the time she entered into the agreement.

d. Petranek had access to counsel, which is sufficient to establish fairness.

The trial court appears to believe that in order to be fair, Petranek had to have independent advise of counsel. (CP 52, p. 7) The Court misunderstood the requirements for determining fairness. The law is that if there is advice given, it must be independent. *Cohn*, 18 Wash. App. at 599. There is no requirement that actual advice be given, only that a party understand that they have the right to obtain counsel, and have access to counsel. *Id.* at 508-09

Blatchley never interfered with Petranek getting an attorney. Petranek's only evidence was that, while living at Greenway, at least six months before filing the petition, Blatchley said not to seek legal counsel. (RP 258) This was likely a result of his hope to engage in an amicable economical dissolution. (RP 315, 317) There is no evidence that he threatened her, coerced her or forced her into entering into the agreement to split the property as they had. He proceeded *pro se*. She proceeded *pro se*. Neither party had an unequal advantage over the other. Petranek is well educated, was used to dealing with her father's probate attorney, and is financially savvy. (CP 52; RP 57, 58, 62, 67, 72, 88) It strains incredulity to believe she was unaware she could get a lawyer if she

wanted one. She had the opportunity for counsel, she just chose not to use it.

This Court's decision in *Shaffer* is clear that an unequal distribution of property at the time the parties enter into an agreement does not automatically make it unfair. *Shaffer*, 47. Wn.App at 193. But this is the thrust of Petranek's argument, she claims it was unfair that she lost \$538,000 of her inheritance in this marriage, and that her agreement to split Greenway equally is inequitable. Yet, as shown throughout this brief, her position is not supported by the facts or the law. The Trial Court's division of property should be overturned.

VI. The Trial Court erred by enforcing a judgment within the 10 stay period mandated by CR 62

On December 22, 2010, the Trial Court entered the final judgment. (CP 56; RP 17) The Trial Court wrote in the Dissolution Decree the requirement that Blatchley turn over a quit claim deed and real estate tax by January 3, 2011, unless he moved for a stay. (RP 22) The Trial Court enforced a judgment without proper authority, and notice of hearing, in violation of CR 62.

[N]o execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry.

CR 62

Petranek prepared and noted for presentment the final orders and judgment on December 22, 2010. Blatchley reviewed and signed the documents and returned them to Petranek's counsel, but retained the quit claim deed and real estate tax affidavit until after the expiration of the time limit in CR 62, in case he made a motion for reconsideration or filed an appeal and stay of judgment. (RP 19-22)

At the hearing for the presentation of final orders, Petranek complained that Blatchley was intentionally delaying the execution of the judgment by not returning a signed quit claim deed and real estate tax affidavit, **before judgment was entered**. (RP 17) Blatchley brought CR 62 to the Court's attention. (RP 18) Petranek contended that CR 62 was specifically designed to allow a judgment debtor to pay on the judgment before garnishment proceedings were taken and that CR 62 does not apply to judgments involving title to real estate. (RP 20) Petranek contended that CR 62 gave a "15 day grace period for people to pay up and comply with it [judgment]" (RP 20)

Petranek cited no case law, yet once again the Trial Court sided with Ms. Bierbaum. (RP 21-22) Petranek contended that ordering Blatchley to convey his interest in the South Edwards property via quit claim deed was not "executing on the judgment", despite clearly asking

the court to order Blatchley to convey the property by no later than January 3, 2011. (RP 19-21) Petranek's position is contrary to law.

Blatchley attempted to explain to the Court that under CR 62 an automatic stay applied, and that Petranek was demanding he convey his interest in the South Edwards property *before* judgment, but that he intended to cooperate and deliver the documents upon the expiration of his time period to file a motion for reconsideration. (RP 18-21) Blatchley wanted to preserve his right to file an appeal or reconsideration before conveying the property, but as indicated by counsel, that decision had not been made. (RP 19-22)

Despite the clear language in CR 62, the Court ordered Blatchley to turn over the signed quit claim deed conveying his interest in the property by January 3, 2011, *to save Petranek from having to ask the Court to appoint a special master in these proceedings.* (RP 21-22) There was no basis for the Court to do this. Regardless of Blatchley's assurances to the trial court of an intent to cooperate, the trial court judge enforced the judgment, apparently to save Petranek's counsel the trouble of properly going through enforcement proceedings if necessary, even going so far as to comment that "I can't imagine you might want to appeal or anything like that." (RP 22)

CR 62(b) references CR 59 and the ability to seek a stay.

Professor Tegland discussed the period of time required by CR 62, and clearly disagrees with Petranek:

During this time, enforcement of the judgment is said to be stayed. The procedure is often referred to in a general way as a stay of execution, but the term stay of enforcement is more accurate because a stay bars all enforcement of a judgment, not just enforcement through execution proceedings.

The judgment debtor need not take any action to implement the rule. The rule is designed to allow time for the judgment debtor to concentrate on seeking post-judgment or appellate relief, **without the threat of enforcement proceedings.**

4 Wash. Prac., Rules Practice CR 62 (5th ed.)

Ordering Blatchley on December 22, 2010 to convey his interest in South Edwards so as to comply with the final judgment awarding this property to Petranek is an enforcement of judgment in clear violation of CR 62. Blatchley was severely prejudiced by the Court's order, because it foreclosed his possibility to move for reconsideration or seek a stay. The trial judge eliminated Blatchley's ability to concentrate on post-judgment relief, and made it very apparent that it was very unlikely any relief sought by Blatchley would be granted anyway.⁴ The trial judge was given the

⁴ The Court may wonder why Blatchley did not go back and seek reconsideration or another stay after December 22, 2010. The trial court had vacated the original decree in Petranek's favor, the trial court had awarded her a substantially disproportional amount of the community property, and finally the trial court simply ignored CR 62 in Petranek's favor. It was clear that Blatchley could not garner a favorable ruling in the trial court. .

statute to review at the hearing, but simply ignored the law and enforced the judgment because Ms. Bierbaum demanded it. The trial court should be reversed.

E. CONCLUSION

The trial court clearly erred when it vacated the original April 11, 2008 dissolution decree without legal authority to do so. Petranek alleged coercion, but there was no evidence. She alleged ambiguity, but the division of South Edwards was plainly stated on the April 11, 2008 decree. Blatchley then had to incur substantial costs litigating his case that was originally settled by a *pro se* agreed resolution

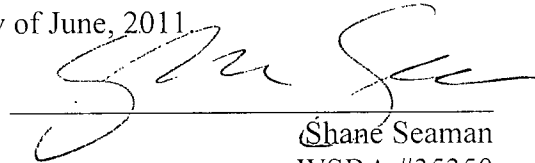
At trial, Judge Verser disregarded clear evidence that contradicted his findings that Petranek funded the marriage with an inheritance of \$538,000.00. Two-hundred thousand dollars couldn't even be substantiated, and there was at least \$56,948.67 loss in the market. The trial Court then misapplied *Marriage of Nuss*, to justify giving Petranek 75% of the community. This was an unreasonable division and an abuse of discretion.

The Trial Court failed to consider the fact that Blatchley's separate property funded the original parcel of real property, misreading *Marriage of Brown*. The Trial Court failed to find clear, cogent and convincing evidence of an agreement to split the proceeds of the sale of Greenway 50/50. The Trial Court disregarded evidence of an agreement to fund separately the purchase of South Edwards and the trial court ignored the fact that Petranek freely and voluntarily agreed to split South Edwards 1/3-2/3 when she prepared the April 11, 2008 decree.

It was an error for the Trial Court to determine that because the parties were still legally married in August 2007 they couldn't take steps to split their property in contemplation of divorce that was filed only four months later. The record contradicts the Trial Court's findings. The Trial Court then incorrectly determined that even if the agreement existed it wasn't fair, erroneously applying *Marriage of Shaffer*. The evidence clearly shows Petranek knew the extent of the assets, and knowingly, voluntarily and intelligently entered into the agreement and she could have sought counsel.

The Trial Court then enforced a judgment against Blatchley on December 22, 2010 in clear violation of CR 62, to save Petranek from having Ms. Bierbaum request a special master, despite no evidence of one being required.

Respectfully submitted this 25 day of June, 2011

A handwritten signature in dark ink, appearing to read "Shane Seaman", written over a horizontal line.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

BRUCE BLATCHLEY,

No. 47122-7-II

Appellant,

DECLARATION OF SERVICE

vs.

SANDRA PETRANEK,

Respondent.

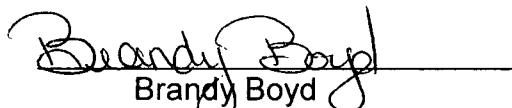
On the dated stated below, I caused a copy of the following documents to be served on the parties listed below by the method(s) indicated:

1. Appellant's Opening Brief
2. Declaration of Service

Party/Counsel	Additional Information	Method of Service
Peggy Ann Bierbaum 800 B Polk Street Port Townsend WA 98368	Attorney for Respondent WSBA # 21398	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Fed-Ex/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Port Hadlock, Washington this 24th day of June, 2011.



Brandy Boyd
Paralegal to Knauss & Seaman